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DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT
OFFICE OF LAND QUALITY

RE: #09-213 (WPCB) (CAFO Rulemaking)

Fax #: (317) 233-5970

These comments are submitted on behalf of the Livestock and Poultry Rule Revision Group. This group has been meeting for nearly three years in an effort to assist IDEM in crafting rules that will be protective of the environment while also maintaining the ability of livestock and poultry producers to continue in their profession and earn a living. The agricultural organizations which have participated in these meetings include Indiana Pork Producers, Indiana State Poultry Association, Indiana Beef Cattle Association, Indiana Professional Dairy Producers, the dues paying members of the Indiana Soybean Alliance, Indiana Corn Growers Association, Indiana Farm Bureau, Inc., Rose Acre Farms, and Creighton Brothers. We have also been assisted in our discussion and rule comment development by representatives of Purdue University, state and federal government agencies, and various consultants, including Brian Daggy, Michael Veenhuizen, Kristin Whittington, and Julie French.

In general, we have been in favor of adopting the federal regulations for the state Concentrated Animal Feeding Operation (CAFO) NPDES program. Our concerns arise from two places. First, in the areas where the CAFO and CFO provisions interrelate or even overlap, care must be given to ensure the delineations are clear and transitions between the two are streamlined. Second, with limited information available from IDEM or EPA as to how these provisions will be administered, we have a limited ability to appropriately comment up them.

Regarding how the state CAFO NPDES regulations must interrelate with the state CFO program, please consider these concerns:

Exiting the NPDES Program

The vast majority of operations which hold an NPDES permit are no longer required to do so because they do not discharge nor do they propose to discharge. Many of those operations have either renewed their permits during this rulemaking process or have become newly permitted. Because those operations no longer need to maintain an NPDES permit but may be subject to several more years of regulation under the current

permit, a process which allows them to exit the CAFO NPDES program while recognizing their previous application and/or renewal must be developed. It is necessary to include a provision establishing a streamlined procedure for these and other NPDES permit holders to exit the NPDES program and to maintain approval under the CFO program. Since the operations considering opting out of the NPDES program will have already undergone the permitting process and be valid permit holders, they should not have to go through another permitting process. All operations currently operating with NPDES permits are considered CFOs by Indiana statute. Additionally, the application process for obtaining an NPDES permit, as well as the NPDES regulations, require that an operation be subject to the construction requirements of the CFO program. As such, a CAFO operator who is eligible to exit the NPDES program should have two options: retain the NPDES permit or revoke the notice of intent (NOI). If the producer elects to revoke the NOI, the facility should automatically enter the state CFO program.

General Permits

We understand that EPA's stance toward Indiana's current general permitting structure necessitates the elimination of the general permit in its current form. However, we urge IDEM to consider the implementation of administratively issued general permits in the future. The general permit is useful where the operation to be permitted will adhere to a specific set of standards. In a regulatory climate where there is great uncertainty as to how EPA will administer these regulations, many producers may opt for an NPDES permit to avail themselves of that added protection. Since the possibility exists for an influx of these types of NPDES applicants in the future, Indiana should consider streamlining the permitting process by implementing an administratively issued general permit.

As discussed above, there has been little guidance from EPA on how the provisions of the NPDES program will be implemented. There has been no guidance from IDEM. Without the ability to comment on IDEM's approach to implementing these CAFO provisions, we will instead provide recommendations for a few key areas while reserving the right to comment further as IDEM begins to formulate its approach.

Nutrient Management Plans

According to the Second Circuit Court of Appeals decision in Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486 (C.A.2 2005), nutrient management plans must be subject to notice and comment provisions. Throughout the federal NPDES permitting process, there was much concern about whether agricultural operations would be able to maintain the flexibility needed to make adjustments to nutrient management and crop decisions based upon factors beyond the control of the farmer, such as delays in planting caused by wet

weather. In the federal rule, two options were provided for nutrient management planning—the linear and narrative approaches.

Upon consideration of the guiding principles from the federal NPDES rule, we propose that the state NPDES rule authorize the use of programs such as Manure Management Planner (MMP), developed at Purdue University, as a main component for nutrient management planning. MMP is a program which has the above listed requirements as the basic foundation for the program's calculations and effectiveness. To use the program, one must download the requisite GIS data for the fields for application, input soil test results, cropping data, and important geographical and conservation features, and then the program will complete the calculations and provide the specific rate of application. Thus, to satisfy the requirements of a NMP using the narrative approach, a permit holder who uses MMP should be able to submit as a NMP the fact that MMP is used and the methodologies by which they acquire soil test and the other nutrient data listed above.

For producers who do not use MMP as part of the narrative approach, they will have to provide more information as to how the calculations for nutrient rates will be completed, as well as other components of a NMP not covered or included in MMP. Producers using this approach will still be required to provide the methodologies that they use to acquire all of the relevant nutrient data.

With respect to the notice and comment period for nutrient management plans, EPA has allowed for much flexibility by the states. We suggest that the rule allow for NMPs and comments to be submitted electronically. The notice and comment period for the initial submission of a NMP should coincide with the comment period for other provisions for the permit, such as construction approval. We suggest that this period should be thirty days in order to match federal requirements for the notice and comment period for an individual NPDES permit. (40 CFR 124.10)

For substantial modifications of the NMP, the notice and comment period needs to be reduced. This is because substantial modifications may result from time sensitive issues which will require immediate action on the part of the farmer to be able to apply manure for crop needs. For substantial modifications, the time period should be seven days. We believe this is appropriate because the NMP will have already undergone one comment period and the number of changes should be few and require less time for review. For submission and notice with respect to NMPs and later substantial changes, we urge IDEM to consider the use of the internet as an appropriate method to expedite this time-sensitive process.

Self Certification

The federal CAFO NPDES rule contains a provision whereby livestock and poultry operations can self certify that they do not discharge nor do they propose to. This process should be simple and straightforward so that producers are able to achieve the added protection of the self certification. We do believe that much if not all of what the self certification is to accomplish can be shown by the participation in the CFO approval program. Nonetheless, it is imperative that IDEM coordinate with EPA to satisfy any questions that exist with respect to the information needed and requirements to be met for completion of a valid self certification.

Conclusion

We appreciate the efforts of IDEM to complete this rulemaking with respect to the CAFO NPDES permits. This has truly been a lengthy and difficult process as we have all awaited clarity from EPA on how the rule will be implemented. We request that the guidance for implementation of this rule be developed with public input and comment so that the guidance is clear and producers who have CAFO NPDES permits will understand what is required of them to comply with the law.

Once again, we appreciate the opportunity to comment upon the rulemakings with IDEM and we welcome the opportunity to discuss the rule and any issues we have raised in further detail.